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In the Supreme Court of the United States

TROY CAB, INC, ET AL

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL

Respondents.

On Petition For Writ of Certiorari To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under MCL 478.1 and MCL 478.2(1), motor carrier vehicles that engage in intrastate commerce pay an annual fee of $100 for the administration of the Michigan Motor Carrier Act and other Acts related to the safety of Michigan's highways. Petitioners assert that the $100 fee is preempted by the Federal Aviation Administration Authorization Act of 1994. The Michigan Court of Appeals neither addressed nor considered this claim since the Petitioners did not contest the trial court's ruling that federal law did not preempt the challenged fees. The Michigan Court of Appeals, however, did address Petitioners' claim that they were not permitted to discovery facts related to their preemption claim. The Michigan Court of Appeals found the Petitioners never sought evidence relating to the preemption issue despite an ample opportunity to do so.

The questions presented are:

Even if the fact that Petitioners submitted no evidence is ignored and even if their claim of preemption is properly preserved, have Petitioners established that the challenged Motor Carrier Act's fee provisions are preempted by federal law?

Whether this Court should review an issue that was not considered by the appellate court below?

Where the Petitioners failed to present evidence to support their claims, did the Michigan Courts properly grant summary disposition against them?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanderkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

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The opinion of the Michigan Court of Appeals (Pet. App. 1-35) is published and reported as *Westlake Transportation, Inc v Michigan Public Service Comm*, 255 Mich App 589; 662 NW2d 784 (2003). The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal (Pet. App. 73-75) is published and reported at 469 Mich 969; 673 NW 2d 752 (2003). The trial court rulings are unpublished.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art VI, cl 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . shall be the supreme Law of the Land. . . and the judges in every State shall be bound thereby, anything in the Constitution or the Law of any State to the Contrary notwithstanding.

Michigan Compiled Laws (MCL) 478.1 provides:

> Each application filed with the commission for a certificate of authority or for a permit, as required by this act, shall be accompanied by a fee of $100.00. Each application filed with the commission for the renewal of a certificate or permit shall be accompanied by a fee of $50.00 for the administration of this act, which fee shall be in addition to all other fees, and shall be retained by the commission and deposited with the state treasurer, whether or not the certificate or permit or the renewal of the certificate or permit is granted.

MCL 478.2(2) provides:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

49 USC 14501. Federal authority over intrastate transportation.

* * *

(c) Motor carriers of property. –

(1) General rule. – Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. – Paragraph (1) –

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;

* * *

STATEMENT

1. Prior Proceedings

On August 23, 1994, the Federal Aviation Administration Authorization Act of 1994 (FAAAA) was signed into law. Section 601 of the FAAAA preempted state economic regulation of motor carriers related to price, route or services. Section 601 effected a partial preemption of state law, which is evidenced by Section 601's (49 USC 14501(c)(2)) description of matters not covered, wherein Congress stated that the preemption:

> (A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

On September 8, 1994, the Michigan Public Service Commission (MPSC) issued an order, with notice to all interested parties including Petitioners, initiating a contested case proceeding (MPSC Case No. T-1273) to examine the effect of Section 601 of the FAAAA on the Michigan Motor Carrier Act (MCA), MCL 475. 1 *et seq*, and associated rules. In that September 8, 1998 order, the MPSC indicated that following the submission of evidence and testimony, it would issue a decision determining which sections of the MCA and its rules had been preempted and which had not.

On January 11, 1995, following contested case hearings and the submission of briefs by interested parties, the MPSC issued its opinion and order in MPSC Case No. T-1273, identifying those provisions of the MCA and rules promulgated thereunder, that were preempted by Section 601 of the FAAAA as well as those

sections that were not preempted by Section 601 and which remained binding on motor carriers.

With regards to the assessment of annual registration fees, the MPSC found in its January 11, 1995 Opinion and Order that they were not preempted by Section 601 of the FAAAA, stating:

> [T]]he preemptive effect of Section 601 extends only to issues of price, route, and service. Neither the language of Section 601 nor the Conference Report imply that fees imposed by a state's existing regulatory structure might fall within that relatively narrow range of issues. Thus, application of the annual registration fee required by MCL 478.2 is not preempted.

Importantly, the MPSC's opinion also notes that the MCA does not require that revenue received (i.e. from fees) under that law be used exclusively for economic reason. *Id.* Thus, the fees received can be used only to fund non-preempted motor carrier regulatory activities performed by the MPSC.

On appeal, the Michigan Court of Appeals in *In Re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288; 566 NW2d 299 (1997), upheld the MPSC's opinion and order with respect to fees, finding that it was not only in keeping with Section 601's partial preemption but also supported by the record, as follows:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact,

> because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.

The Michigan Supreme Court unanimously denied the application for leave to appeal. 458 Mich 852. One of the parties, Central Transport, Inc., then filed a Petition for Writ of Certiorari. The question presented in the Petition was:

> Whether Section 601 of the Federal Aviation Administration Authorization Act of 1994 ("Section 601"), which prohibits virtually all state regulation of intrastate motor carriers, except for certain specified safety powers, preempts the annual per-vehicle fee provision for intrastate motor carriers contained in the State of Michigan's former economic regulatory statute?

This Court denied the Petition. *Central Transport, Inc v Michigan Public Service Comm*, 525 US 1018 (1998).

2. Proceedings in the instant case

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the MCA. These cases were certified as a class action on June 9, 1995.

Petitioners filed a motion for partial summary disposition asserting that the fee provisions of the MCA were preempted by § 601 of the FAAA On October 13, 1998, the Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denied the motion (Pet. App. 36-50). On December 30, 1998, the Court granted the State Defendants' Motion for Summary Disposition (Pet. App. 54-56). On March 7, 2000 the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 57-72). Petitioners filed a claim of appeal with the Michigan Court of Appeals on March 24, 2000.

b. Michigan Court of Appeals.

On March 11, 2003, the Court of Appeals, issued its opinion in the consolidated appeals and affirmed the Court of Claims summary disposition ruling in favor of the State Defendants. The court stated:

> In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC § 14501[c].)
>
> Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.
>
> *In re Fed Preemption of Provisions of the Motor Carrier Act*, 223 Mich. App. 288, 302; 566 N.W.2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its

regulation of the trucking industry in Michigan was affected by federal legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL § 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL § 478.1; MSA 22.560, for protesting an application for a certificate, MCL § 478.1a; MSA 22.560(1), and for administering the act, MCL § 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the* PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a factual record to the court in a supplemental brief in

response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich. App. 369, 373; 593 N.W.2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they

specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich. App. 244, 250; 639 N.W.2d 261 (2001).

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[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

Petitioners filed an Application for Leave to Appeal with the Michigan Supreme Court on April 1, 2003.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the application for leave (Pet. App. 73-75).

REASONS FOR DENYING THE PETITION

A. Under Michigan Court Rule (MCR) 2.116(c)(10), summary disposition is properly granted where a party opposing such a motion failed to present evidence to support its claim.

In presenting its case at the state level, the Petitioners failed to present evidence in support of its claim that the intrastate fees in MCL 478.2 and MCL 478.2(1) were preempted by § 601 of the FAAAA. On January 3, 1995, Petitioners filed a class action in the Michigan Court of Claims challenging the $100 fee imposed by MCL 478.1 and MCL 478.2(1). They filed and argued a motion for summary disposition in 1995. The Michigan Court of Appeals issued its decision in *In Re Fed Preemption, supra*, on April 25, 1997. The Court of Claims issued its written opinion denying Petitioners' motion on October 13, 1998 (Pet. App. 36-50) and entered its order denying the motion on November 12, 1998 (Pet. App. 51-53). The Court of Claims specifically invited Petitioners to present their argument again if they thought the Court's ruling did not cover the issue. Pet. App. 23. The Petitioners filed a motion for reconsideration and the Court denied the motion on March 7, 2000 (Pet. App. 57-72). While Petitioners were conducting discovery during this entire time, they never sought discovery relating to the issue in this case. As a result the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[1]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan

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[1] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

courts on appeal. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). . . .
>
> * * *
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rule. . . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus even if the Petitioners had stated a *prima facie* case when before the trial court it was also required to show there is a

genuine issue of material fact, that is based on something more than mere conjecture. This the Petitioners failed to do. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co.*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534, 537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co.*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support its claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

After the Petitioners failed to present any evidence in support of its claims, the Michigan Court of Appeals correctly affirmed the Michigan Court of Claims.

B. Because the Michigan Court of Appeals did not review Petitioners' preemption issue, this Court should deny review of that issue.

In discussing the Petitioners' preemption claims that the fees in MCL 478.1 and 478.2(1) are preempted, the Michigan Court of Appeals noted at footnote 9 (Pet. App. 20) of its Opinion:

> We note that plaintiffs do not contest the court's summary disposition ruling, that § 601 did not preempt the intrastate fees.

The Michigan Court of Appeals then addressed the Petitioners' other claim regarding the challenged fee sections, i.e. – whether the Petitioners were wrongly denied discovery or the opportunity to present supplemental pleadings. The Michigan Court of Appeals examined those contentions and found that they lacked merit. (Pet. App. 22-23). The Michigan Court of Appeals,

however, did not address the Petitioners' claim that MCL 478.1 and 478.2(1) were preempted. While the Petitioners' brief (Res. App. 8b-12b) to the Michigan Court of Appeals did contain argument regarding § 601, it is nonetheless clear that the Court of Appeals did not believe the Petitioners had properly contested the trial court's ruling that § 601 did not preempt the intrastate fees. Because the Michigan Court of Appeals held that the issue had not been presented, it did not consider the issue. In the past, this Court has generally declined invitations to review issues not addressed by the appellate courts below. *Zobrest v Catalina Foothills School Dist*, 509 US 1, 8 (1993) (where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") The Petitioners have failed to present any compelling reasons why this Court should depart from that practice.

C. Even if the fact that Petitioners submitted no evidence is ignored, and even if their claim of preemption is properly preserved, they still have not established that the Michigan Motor Carrier Act's fee provisions are preempted by federal law.

1. Introduction.

Basically, Petitioners contend that the Michigan Court of Appeals erred when it did not rule contrary to *In Re Federal Preemption, supra*,[2] even though they acknowledge they submitted no evidence to support their claim and did not prove their case (Res. App. 7b, 13b-14b). Further, their strictly legal argument that Section 601 of the FAAAA results in the preemption of virtually all state motor carrier laws is without merit. The FAAAA, by its own terms, does not support the broad sweep of federal motor carrier preemption, urged by the Petitioners. Section 601 expressly excepts from its preemptive

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[2] As previously noted herein, the Michigan Court of Appeals decision in *In Re Federal Preemption, supra*, was ultimately appealed to this Court, which denied certiorari in *Central Transport, Inc, supra*, to an issue very similar to the one Petitioners present here.

effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods.

The Petitioners erroneously contend that the sole focus of the MCA is the economic regulation of competition. This is not true since the MCA, from its very inception, has had as a dual purpose to "protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways." MCL 475.2.

2. Federal Preemption Is Determined By Congressional Intent, And Is Limited And Strictly Construed With Respect To Statutes Enacted Under The State's Police Powers.

Congressional intent determines whether federal law preempts state law. "[T]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm*, 476 US 355, 369 (1986) ("*Louisiana PSC*"). This Court in *Louisiana PSC* identified when Congress can be understood to have preempted state law:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law..., when there is outright or actual conflict between federal and state law..., where compliance with both federal and state is in effect physically impossible..., where there is implicit in federal law a barrier to state regulation..., where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law..., or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. . . . (Citations omitted). 476 US at 368-369.

Petitioners erroneously argue that Congress has occupied virtually the entire field of regulation. However, federal occupation of a field will not be lightly inferred:

> The principle to be derived from [Supreme Court] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained. *Florida Lime & Avocado Growers v Paul*, 373 US 132, 147 (1963).

Moreover, preemption of matters "within the traditional police power of the State should not be lightly inferred." *Fort Halifax Packing Co v Coyne*, 482 US 1, 21 (1987). A federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress." *Hillsborough County v Automated Medical Laboratories, Inc*, 471 US 707, 715 (1985).

This Court has also recognized that, in exercising its power under the Commerce Clause, "Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field." *Mabee v White Plains Publishing Co*, 327 US 178, 184 (1946). In *Cloverleaf Butter Co v Patterson*, 315 US 148, 155 (1942), this Court added that, where there has only been a partial exercise of the federal government's power over interstate commerce, "the state may legislate freely upon those phases of the commerce which are left unregulated by the nation."

As is evident from its plain language, Congress in Section 601 effected only a *partial* preemption, while expressly *preserving* other state regulation (safety, fitness, etc), which necessarily includes the attendant fees used for such continued regulation. Congress neither sought nor intended to occupy virtually all motor carrier regulation (or to bar continued state regulation in

the areas not preempted). Section 601 did not preempt areas relating to safety, fitness, certificates, fees, among others.

3. The Express Language Of FAAAA Section 601 And Its Legislative History Establish That Congress Did Not Intend To Preempt Non-Economic State Regulation Of Intrastate Transportation Of Property By Motor Carriers, Including Safety and Fitness Regulation, And The Issuance Of Certificates And Collection Of Fees Related Exclusively To Such Non-Preempted Regulation.

Section 601 provides for only partial preemption of traditional state authority to regulate intrastate motor carrier matters, and did not preempt all state regulation of for-hire carriers as Petitioners' claim. By its own terms, Section 601 provides for only partial preemption of state regulation, namely, economic regulation "related to a price, route, or service of any motor carrier". Section 601(h) [49 USC 14501(c)], in pertinent part, states:

> (1) GENERAL RULE. -- Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4) of this title) or any motor private carrier with respect to the transportation of property.
>
> (2) MATTERS NOT COVERED. -- Paragraph (1) --
>
> (A) *shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial*

> *responsibility relating to insurance requirements and self-insurance authorization; and*
>
> (B) *does not apply to the transportation of households goods.* (Emphasis added).

Besides the plain language of Section 601's statutory provisions, the legislative history also establishes that only a *partial* preemption was intended by Congress, and not the sweeping preemption that Petitioners suggest. The preemption as stated pertains only to that which is "related to a price route, or service of any motor carrier." The legislative history further indicates that the specific exemptions from preemption listed in Section 601(h)(2)(A) (e.g., safety, financial fitness, fees, size, weight, etc.) were *not* intended as a specific or exhaustive list, but were meant as examples of the kind of state regulation that remains. In other words, Congress preempted only those matters which are expressly preempted in the FAAAA, and nothing else. In this regard, the House Conference Report No. 103-677, p. 84, reprinted in 1994 U.S.C.C.A.N. 1756 states:

> Paragraph (4)(B) emphasizes that State authority to regulate safety, financial responsibility relating to insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of air carriers and carriers affiliated with a direct air carrier through common controlling ownership is unchanged, since State regulation in those areas is not a price, route or service and thus is unaffected. (This provision is identical to the new subsection 11501(h)(2)(A) discussed below.) *This list is not intended to be all inclusive, but merely to specify some of the matters which are not "prices, rate or services" and which are therefore not preempted.* (Emphasis added).

The House Conference Report No. 103-677, reprinted in 1994 U.S.C.C.A.N. 1757 further indicates that those matters which are not a price, rate or service are not preempted, stating as follows:

> New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected. This subsection is identical to section 41713(b)(4)(B), described above.

The same House Conference Report also provides compelling evidence that congressional intent is not to preempt the ability of the states to issue statewide certificates of authority applicable to motor carriers to demonstrate their compliance with state and federal laws, or to interfere with tax (or fee) laws, as follows:

> Furthermore, neither preemption provision would preempt the ability of a State to issue a certificate or other documentation (in written or electronic form) demonstrating that the carrier complies with State requirements which are not preempted by these sections and nothing in this amendment is intended to change the application of State tax laws to motor carriers. [House Conference Report, 103-677, p. 85, reprinted in 1994 U.S.C.C.A.N. 1757.]

Petitioners, however, claim that a broad preemptive purpose can be ascertained by looking at the language Congress has used to deregulate the airline industry (citing Airline Deregulation Act of 1978 (ADA), 49 USC 41713). Petitioners indicate that the ADA prohibited the states from enacting or enforcing Laws "relating to rates, routes, or services." Citing the House Conference Report on Section 601, Petitioners claim that this Court's decision in *Morales v TransWorld Airlines*, 504 US 374 (1992) should be the starting point for any determination of the preemptive effect of the FAAAA.

The *Morales* case, however, involved a different issue, under a different Act, relating to solely to airlines. Furthermore, the FAAAA, adopted in August 1994, and effective January 1, 1995, was simply not before this Court in *Morales* in 1992. As with any other statutory construction issue, any analysis of Section 601 of the FAAAA should start with the plain language of the FAAAA itself.

It should also be noted that Section 601 was expressly given prospective, not retroactive, effect. By its terms, Section 601 is effective January 1, 1995. The FAAAA did not transform this Court's ruling in *Morales*, applicable to an airline, as a retroactive preemption of state law relative to motor carrier regulation. Moreover, the MPSC prior to the adoption of Section 601 had already ruled that economic regulations related to rates, routes, or services do not apply to air carriers, or to motor carrier operations integrated with air carriers, but would apply only to ground-only motor carrier functions, not having a connection with air carriers.[3] Thus, the MPSC has always regulated in a manner consistent with the 1992 *Morales* decision.

Also, in *Morales*, the airlines sued to enjoin various State attorneys general from enforcing state guidelines requiring that airline advertisements contain certain disclosures as to fare terms, restrictions and availability. The Court concluded that the airlines' advertisements "relat[ed] to rates" and were therefore preempted by the ADA. This Court, however, in *Morales* emphasized the limited reach of its holding:

> Nor need we address whether state regulation of the non-price aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e]

---

[3] The MPSC in its August 25, 1992 Order in *In Re Federal Armored*, MPSC File No. 23409, Case No. 5, determined that the economic regulation of motor carrier air-ground services were subject to preemption under Section 1305 of the Airline Deregulation Act, but the carrier's strictly ground-based services were not preempted.

> to' rates; the connection would obviously be far more tenuous. . . . *'[s]ome [S]tate actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect.* (Emphasis added). 504 US at 390.

Both Section 601 itself and House Conference Report 103-677 thus indicate that with the preemption of state regulation "related to a price, route, or service of a motor carrier" that Congress listed, by example and not specific list, several major areas of state regulation which were *not* preempted. Such examples included, *inter alia*, the major area of safety related regulation and the ability of states to review and issue (or deny) statewide certificates of authority to ensure compliance with state and federal law. Similarly, Section 601 contains no language suggesting that the collection of fees is in any way altered. In fact, the presumption is that the fee collection power was continued in order to provide revenues to ensure proper safety related regulation, and to ensure that the motor carrier industry pays its fair share of services rendered by the states, which benefit motor carriers.

The legislative history indicates that a primary intent behind Section 601's preemption was to provide a level playing field relative to economic regulation of motor carriers and air carriers, and *not* to impact safety or other non-economic motor carrier regulation. House Conference Report, 103-677, pp. 85-87, reprinted in 1994 U.S.C.C.A.N. 1757-1759. Thus, the overriding goal of Section 601 was to put all motor carriers on an equal competitive footing regardless of whether their services did or did not include an air carrier component. Therefore it may be seen that the FAAAA's preemption relates to the economic regulation relating to a "price, route, or service" and not to other regulatory areas, and not to areas of state regulation that Section 601 expressly exempted from preemption (safety, fitness, etc).

4. The Michigan Court of Appeals correctly held in *In Re Federal Preemption, supra*, that FAAAA Section 601 does not preempt the MCA fee provisions.

The Michigan Court of Appeals in *In Re Federal Preemption,* 223 Mich App at 301, correctly found that the clear and unambiguous language of Section 601 expressed Congressional intent not to preempt all state regulation of the trucking industry. The Court of Appeals characterized Section 601's preemptive effect as follows:

> Congressional intent is the cornerstone of preemption analysis. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997). Regardless of the similarities between the Airline Deregulation Act of 1978 and § 601 of the FAAAA, it is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . [T]he House Conference Report indicates that "economic regulation" is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103rd Cong, 2nd Sess, pp 84-85. The title given to § 601(h) is "Preemption of State Economic Regulation of Motor Carriers." (Emphasis added.) The argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation.

The Court of Appeals then concluded, 223 Mich App at 302-303:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected wee or can be used only for what is now preempted economic regulation.

Despite having submitted no additional evidence in the instant case, Petitioners continue to argue that MCL 478.1 and MCL 478.2 which provide for the collection of fees, were preempted by Section 601. The Petitioners' entire theory, however, is based upon the erroneous premise that the fees are to be impliedly swept into preemption as relating to "a price, route, or service of any motor carrier." As noted, however, neither the issuance and renewal of statewide certificate authority, nor the state fees at issue, were intended to be preempted by Congress, as they are not related to "a price, route, or service" of a motor carrier.

The Petitioners fail to acknowledge that Congress, by expressly preserving significant aspects of state motor carrier regulation such as safety, fitness, etc., adopted only a partial preemption of state law. Moreover, the part of regulation

preempted by Section 601 does not affect the regulatory fees in this case as the MPSC has not engaged in any economic or other regulation preempted by Section 601. Since January 1, 1995, the MPSC has only engaged in regulatory activity, such as safety, which is expressly not preempted by Section 601, and has used all collected regulatory fees only for said activity or to reimburse the state for motor carrier related costs.

Although the Petitioners' claim that preemptive effect of the FAAAA was more extensive than what the Michigan Court of Appeals found, they have failed to address or rebut major underpinnings of the Michigan Court of Appeals' decision. For example, the Court of Appeals found that the FAAAA, by its own terms, does not support the "broad sweep of the federal motor carrier preemption", urged by the Petitioners.

The Petitioners fail to come to grips with the fact that the Michigan Court of Appeals finding with respect to the extent of the FAAAA's preemption comes from a plain reading of that Act. In essence, what the Michigan Court of Appeals found is that because the statute is clear and unambiguous, no statutory interpretation is necessary. Thus, the language of the statute controls.

In summary, Section 601 contains no language that preempts the continued authority of the states to grant statewide certificates to ensure continued compliance with state and federal laws applicable to motor carriers, and to collect applicable fees to fund non-preempted regulation such as safety and fitness. Moreover, Congressional intent, discussed *infra*, indicates that no preemption of statewide certificates or fees was intended.

5. A Major Purpose Of The MCA Extends To Safety Regulation, Which Has Been Preserved By FAAAA Section 601.

Petitioners erroneously contend that the sole focus of the MCA is state economic regulation of motor carriers. Petitioners are incorrect because the MCA, since its enactment in 1933, has

had the dual purpose of not only economic regulation, but also, importantly, safety regulation.

The very first titled purpose of the Motor Carrier Act is "to promote safety upon and conserve the use of public highways of the state..." This is restated in the purpose and policy section of the Act, MCL 475.2, which states in part as follows:

> It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and the authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to:... (b) *protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways*;... (emphasis added).

The current title to the MCA also provides for the collection of fees and taxes from motor carriers to promote highway safety and conservation as follows:

> [T]o provide for the levy and collection of certain privilege fees and taxes for such carriers *for such purposes* and the disposition of such fees and taxes; ... (emphasis added).

The MCA extensively addresses safety, fitness, and insurance issues. MCL 475.5 tailors the duration of evidentiary proceedings to accommodate fitness issues, and MCL 476.3 requires MPSC review of applications for certificates of authority to verify the physical condition of the equipment and property of the applicant as well as to ascertain that the vehicles of the applicant have passed an inspection within the proceeding 12 months pursuant to the requirements of the Motor Carrier Safety Act, 1963 PA 181, MCL 480.11, *et seq*.

Sections 476.5, 476.10, 478.7, 479.9, 479.10, 479.11, 479.12 and 479.13 all underscore and amplify the Commission's regulatory duties relating to public safety as they apply to motor carriers. These sections spell out the Commission's responsibilities ranging from insurance monitoring and other record checking to leasing, contested case evidentiary presentations, rulemaking responsibilities, and collection of assessments. The MPSC is also granted "authority to prevent evasion of this act through any device or arrangement" [Title and MCL 475.2(l)] and to do "all things necessary to carry out and enforce this act." (MCL 476.10).

Both the MPSC and the State Police also act in concert, in many instances, to enforce both the MCA and the Michigan Motor Carrier Safety Act, 1963 PA 181, MCL 480.11, *et seq*. In addition, 1993 PA 352, effective January 13, 1994, now Article VI of the MCA, MCL 479.41 ("Art VI"), which expands the MPSC jurisdiction and authority relative to motor carrier safety, in conjunction with the State Police, states:

> Sec. 1. The commission shall supervise and regulate the safety of operations of each motor carrier. The commission may promulgate rules for the purpose of promoting safety upon the highways and the conservation of their use. [MCL 479.41].
>
> * * *
>
> Sec. 2. Upon request of the commission, the department of state police shall review the operation of an intrastate motor carrier to determine whether the carrier is in compliance with applicable safety related laws and rules and issue a report within 60 days after completion of its review to the commission. [MCL 479.42].
>
> * * *
>
> Sec. 3. The public service commission, in cooperation with the department of state police, will develop and

> implement by rule or order a motor carrier safety rating system within 12 months after the effective date of this article. In the rating system, an unsatisfactory rating shall not be imposed without an on-site safety review being conducted by the department of state police. [MCL 479.43].

MCA Art VI thus explicitly authorizes cooperative functions between the MPSC and State Police in furthering motor carrier related public safety. Pursuant to Art. VI, the MPSC may request State Police review of the operations of particular motor carriers for compliance with safety related laws and rules. Moreover, the two agencies are directed to cooperate in developing a motor carrier safety rating system which is now in place and is being administered by the MPSC.

In light of the foregoing, the Petitioners contention that the MCA's sole focus was the economic regulation of motor carriers lacks merit. Instead, the MCA contains numerous provisions related to safety and other matters not preempted by Section 601 of the FAAAA. The MPSC has made a good faith effort to comply with federal law and has done so by identifying those provisions of the MCA that were preempted by the FAAAA and which would no longer be enforced by the MPSC pending anticipated action by the Michigan Legislature to conform the MCA with the FAAAA. The determinations made by the MPSC are consistent not only with the plain language of Section 601 of the FAAAA but also with the legislative history underlying that enactment.

6. Petitioners' arguments concerning the distinction between "motor vehicle" and "motor carriers" is without merit.

Petitioners have misconstrued the interchangeability of the word motor vehicles and motor carrier as being an exclusion of a motor carrier of property from the state regulatory authority.

Their premise is based upon 49 USC 14501(c)(2)(A), which provides:

> Matters not covered. Paragraph (1) -- shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

Petitioners' construction of the statutory term is too narrow and no evidence on record supports this assertion. To be a motor carrier one must have the direction and control of a motor vehicle, which does the carrying for him. *Moore v United States*, 41 F Supp 786, 792 (DC Minn 1941), *aff'd* 316 US 642 (1942). See also *Loving v United States*, 32 F Supp 464 (1940) using the word a common carrier by motor vehicle.

In addition, pursuant to 49 USC 13102(12): "The term 'motor carrier' means a person providing motor vehicle transportation for compensation."

Further, Petitioners' additional assertion is that the only regulatory authority conferred by Congress on the state is with respect to motor vehicles is contradictory to a reasonable interpretation of § 14501(c)(2)(A). When considering preemption, the Court starts with the assumption that the historic police powers of the States re not to be superseded by the Federal Act unless there is a clear and manifest purpose of Congress to do so. *City of Columbus v Ours Garage and Wrecker Serv*, 536 US 424, 432-433 (2002) (quoting *Rice v Santa Fe Elevator Corp*, 331 US 218, 230(1947)). Also, "Federal preemption prescriptions *relating to motor carriers*, contained in 49 USC 14501(c), specifically save to States "safety regulatory authority. . . with respect to *motor vehicles*. § 14501(c)(2)(A). *Id.* at 427-428. The

Court referred to federal preemption relating to motor carriers and not motor vehicles.

This Court and Congress interchangeably used the phrase motor carriers and motor vehicles. Furthermore, the definition under 49 USC 13102, which defines a motor carrier as a provider of a motor vehicle for compensation confirms Petitioners' misconception. Neither the statute nor case law supports Petitioners' distinction between motor carriers and motor vehicles.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: May, 2004

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STATE OF MICHIGAN
COURT OF APPEALS

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Plaintiffs/Appellants,

and

COA 226052
COA 226122

AMERICAN TRUCKING ASSOCIATIONS, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Court of Claims
No. 95-15628 CM

Intervening Plaintiffs/Appellants,

PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

MICHIGAN PUBLIC SERVICE COMMISSION, its COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL, and JOHN L. O'DONNELL, MICHIGAN DEPARTMENT OF TREASURY and its STATE TREASURER and the STATE OF MICHIGAN,

Defendants/Appellees,

Consolidated With,

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, FRANK TIBERIO, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC.,

d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MID-CON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H&H ENTERPRISES, INC., D/B/A S&M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING CO., U.S. TRUCK CO., INC., WEST END CARTAGE, INC., CENTRAL CARTAGE CO., CTX, INC., MOHAWK MOTOR OF MICHIGAN, INC., ECONOMY TRANS-PORT, L.T.D., MASON & DIXON LINES, INC., UNIVERSAL AM-CAN, L.T.D., ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, O-J TRANSPORT COMPANY, J-LAW ENTERPRISES, INC., ALLIANCE OF O-J TRANSPORT, INC., Individually on behalf of all others similarly situated,

Plaintiffs/Appellants,

v

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TREASURY, TREASURER OF THE STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF COMMERCE, DIRECTOR OF THE MICHIGAN DEPARTMENT OF COMMERCE, MICHIGAN PUBLIC SERVICE COMMISSION, CHAIRMAN OF THE MICHIGAN PUBLIC SERVICE COMMISSION, JOHN G. STRAND, COMMISSIONER OF THE MICHIGAN PUBLIC SERVICE COMMISSION, RONALD E. RUSSELL, and COMMISSIONER OF THE MICHIGAN PUBLIC SERVICE COMMISSION, JOHN L. O'DONNELL,

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PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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Separate from their challenge to the Interstate Decal Fee imposed upon interstate motor carriers, Appellants also sought to demonstrate to the Court of Claims that the $100 Intrastate Decal Fee assessed against intrastate carriers under MCL § 478.2(1); MSA 22.561(1) is preempted effective January 1, 1995 pursuant to Section 601 of the FAAAA. As shown below, the broad preemptive scope of Section 601, when read in light of In re Federal Preemption, supra, compels reversal and remand to the Court of Claims for further fact-finding relevant to Appellants' claim. Appellants remain convinced that, had they not been denied a full and fair opportunity to prove their case, judgment in their favor on their Section 601 claims would have been ordained.[18]

[18] By its terms, Section 601 does not apply to state laws or regulations relating to the price, route, or service of a motor vehicle engaged in the transportation of household goods. 49 USCA § 14501(c)(2)(B). Thus, insofar as MCL § 478.2(1); MSA 22.561(1) imposes a $50 decal fee on vehicles used exclusively for the intrastate transportation of household goods, it is not the subject of either the Westlake Complaint or the Troy Cab Complaint and should not be the subject of any court order in this case.

1.
Section 601 Broadly Preempts All Laws Related To Motor Carrier Prices, Routes, And Services

Section 601, entitled Preemption of Intrastate Transportation of Property, was enacted by the 103rd Congress, signed into law by President Clinton on August 23, 1994, and upheld as a valid exercise of preemptive powers in Kelley v. U.S., 69 F.3d 1503 (10th Cir. 1995), cert. denied, 517 U.S. 1166, 116 S.Ct. 1566, 134 L.Ed.2d 665 (1996). In enacting Section 601, Congress expressly found that state regulation of intrastate transportation has unreasonably burdened interstate commerce, impeded the free flow of trade, and proved unreasonably costly. Section 601(a)(1), 108 Stat. 1605, 1605.[19] Thus, effective January 1, 1995, Section 601(c) broadly preempted the MPSC's economic regulation of intrastate motor carrier operations by directing that no state or political subdivision may

> enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier. . . .

49 USCA § 14501(c)(1) (emphasis supplied).

The limited exceptions to Section 601, none of which apply in this case, are extremely narrow. Specifically, states may still regulate activity related to cargo liability, bills of lading, cargo credit rules, or antitrust immunity, but only if a motor carrier voluntarily subjects itself to such state regulation. 49 USCA § 14501(c)(3). In addition, the states are still afforded authority in three other safety-related arenas:

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[19] A complete copy of Section 601 is reproduced in the Appendix at 17. As applied to motor carriers, Section 601 was originally codified at 49 USCA § 11501 (1994 Supp.) (superseded) but later recodified in substantially-similar form at 49 USCA § 14501 (1997).

(1) Motor vehicle safety;

(2) Highway routing or limitations based upon the size or weight of the motor vehicle or the hazardous nature of the cargo; and

(3) Minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

49 USCA § 14501(c)(2)(A). Notably, these three non-preempted areas embrace common "police powers" that are in virtually all circumstances reserved to and exercised by state authorities over every kind of motor vehicle, not just motor vehicles operated by for-hire motor carriers.

That Section 601 is intended to have broad preemptive effect is shown by legislative history evidencing Congress's intent to deregulate the motor carrier industry in the same broad way it previously deregulated the airline industry. As that legislative history shows, the House conferees expressly adopted "the broad preemptive interpretation" set forth in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992), a decision that interpreted the preemptive language of the Airline Deregulation Act ("ADA"). House Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. (1994), reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1755 (hereinafter cited as "Report"). In Morales, the U.S. Supreme Court held that airline advertising was related to rates, routes, or services and thus state law could in no way regulate such advertising. The Court then went on to hold that any state law or regulation having any "connection with, or reference to," a rate, route, or service of airline transportation was preempted. 504 US at 384; 112 SCt at 2037; 119 L Ed2d at ___.

The U.S. Supreme Court's words illustrate that, in making express reference to Morales, the House conferees sought to remove all doubt as to whether Congress intended sweeping

preemptive changes to motor carrier regulation when it enacted Section 601. Using the plain-spoken phrasing of Morales, preemption of laws "related to a price, route, or service of any motor carrier" means expansive and conspicuous preemption of all laws "having a connection with or reference to" a price, route, or service of any motor carrier.[20] Also relevant is the U. S. Supreme Court's more recent interpretation of the ADA in American Airlines v Wolens, 513 US 219, 115 SCt 817, 130 L Ed 2d 715 (1995), in which the Court found that a claim based on state-imposed obligations – which the MSPAC's claim to the Intrastate Decal Fee clearly is – is a preempted activity.[21]

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[20]As indicated in the Report, the wording interpreted in Morales, supra, is slightly different from that employed in Section 601. Under the original airline deregulation statute, the words employed were "relating to rates, routes, or services," while under the recodified version of that statute and under Section 601, the words employed are "related to a price, route, or service." However, the conferees stated that they did not intend to "alter the broad preemption interpretation" of Morales by "substituting the word 'related' for the prior word 'relating' and the word 'price' for the word 'rates'... ." Report, reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1755.

[21]More recently, this Court has itself had occasion to address the preemptive scope of both the ADA and Section 601 in cases that are not analogous to this case. Compare Thomas v. United Parcel Service, 241 Mich. App. 171, 614 N.W.2d 707 (2000) (race and gender discrimination claim not preempted) with Gilman v. Northwest Airlines, Inc., 230 Mich. App. 293, 583 N.W.2d 536 (1998) (age and sex discrimination claim not preempted) and Fitzpatrick v. Simmons Airlines, Inc., 218 Mich. App. 689, 555 N.W.2d 479 (1996), lv den, 456 Mich. 891, 570 N.W.2d 785 (1997) (airline height and weight standards preempted). More relevant decisions by this Court in In Re Federal Preemption, supra, and Michigan Trucking Ass'n v. Michigan Public Service Commission, 225 Mich. App. 424,

571 N.W.2d 734 (1997), lv den, 459 Mich. 859, 583 N.W.2d 900 (1998) are discussed above.

Significantly, the federal preemption brought about by the ADA was so broad that it also had an effect on motor carriers. Therefore, in Federal Express Corp v California Public Utilities Commission, 936 F2d 1075 (9th Cir 1991), cert den, 504 US 979, 112 S Ct 2956, 119 L Ed 2d 578 (1992), on remand, 1993 WL 399380 (ND Cal 1993) (unpublished),[22] the appellate court ruled that the ADA preempted state regulatory control over motor vehicle operations that were an integral part of an air carrier's integrated business. Among the regulatory provisions nullified by the court was a quarterly fee assessed by the state public utilities commission that, like the Intrastate Decal Fee, was primarily used to defray the cost of economic regulation. See 1993 W.L. 399380 at *6 (citing Cal Pub Util Code §§ 5003.1). In the Court's view, "[t]he PUC's... imposition of fees enter[ed] the zone that Congress has forbidden the states to enter," and, as a result, the California regulatory fee was preempted. 936 F 2d at 1078.

Further, on remand in Federal Express, the district court reviewed the ADA's impact on a regulatory fee imposed upon so-called exempt carriers, those whose rates were not regulated. The court held that the exempt carrier fee was preempted, rejecting the California commission's argument that the fee revenue was necessary for non-economic (non-preempted) regulation. Because the fee revenue was "applied indiscriminately to the full range of CPUC regulatory activity," 1993 WL 399380 at *7, the court persuasively held that the fee could not be harmonized with the ADA as supporting only an isolated class of acceptable regulation.

Like the California fee provisions, the Intrastate Decal fee has been used to support and provide for the economic regulation of motor carrier rates, routes, and services as dictated by the language in the MMCA, and, as will be

[22]The unpublished decision on remand is reproduced in the Appendix at 18.

discussed further below, there was no evidence presented to the Court of Claims that the fee is now used exclusively for non-preempted activities related only to Appellants' operations. Further, a $100 fee imposed annually on each vehicle used by a motor carrier engaged in the intrastate transportation of property cannot help but be "related to a price, route, or service" of the motor carrier. As such , the Intrastate Decal Fee should have been captured by the preemptive net of Section 601. As shown below, however, the Court of Claims placed undue reliance on In Re Federal Preemption, supra, and erroneously ruled to the contrary.

2.

Under In Re Federal Preemption, Appellants Should Have Been Afforded The Opportunity To Prove Their Case

On April 25, 1997, after the parties' cross-motions for disposition had been fully briefed and argued, this Court handed down its opinion in In Re Federal Preemption, supra. The case arose from administrative proceedings in which the MPSC determined for itself which provisions of the MMCA it deemed preempted by Section 601. On appeal, this Court ruled – based upon the limited record before it – that all fees imposed by the MMCA survived preemption because the MPSC "still has significant regulatory obligations" after enactment of Section 601. 223 Mich. App. at 302, 566 N.W.2d at 305. As a result, the Court of Claims decided that In re Federal Preemption was outcome-determinative of Appellants' claim and entered summary disposition in favor of Appellees. The Court of Claims erred, however, because its undue reliance upon In re Federal Preemption was misplaced.

In In re Federal Preemption, this Court simply accepted the MPSC's representation, without benefit of any factual record, that it would not use the Intrastate Decal Fee to support preempted portions of the MMCA. Further, the Court noted that the parties opposing the MPSC's action had not proven

anything to the contrary. Specifically, the Court observed as follows:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. There is still a certification process. It follows that the fees ... for administering the act ... are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants ... have not shown that the cost of the PSC's operations [has] ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation.

Id. at 302-03, 566 NW2d at 305 (citations omitted; emphasis supplied). Importantly, Appellants sought to submit the proof lacking in In Re Federal Preemption, but they were denied that opportunity by the Court of Claims.

On March 23, 1998, Appellants filed with the Court of Claims a Motion for Partial Stay and Bifurcation of Issues in response to the In Re Federal Preemption decision. Appellants asked the court to bifurcate their Section 601 claim from the pending cross-motions for summary disposition and to stay its hand for a period of 90 to 120 days while Appellants conducted discovery and made a factual record for the court. It was Appellants' express intent to directly address In re Federal Preemption by supplementing their motion for summary disposition with evidence demonstrating the MPSC's continued use of the Intrastate Decal Fee for economic regulatory purposes contrary to the terms and intent of Section 601 and

further showing why the MPSC's continued collection of the same fees for substantially-reduced regulatory activity should be deemed preempted. See Plaintiffs' Motion for Partial Stay and Bifurcation of Issues. The Court of Claims, however, denied Appellants' motion and then ruled against Appellants on their Section 601 claim almost six months later.

In Re Federal Preemption is not dispositive of Appellants' challenge to the Intrastate Decal Fee. Rather, what was dispositive of Appellants' claim was the Court of Claims' erroneous ruling denying Appellants the opportunity to present the type of factual record that this Court did not have when it issued the In Re Federal Preemption decision. Notably, Appellants requested, at most, four months to make their record, which, given the Court of Claims' six-month delay in ruling following its denial of Appellants' motion, would have been more than sufficient time to make a difference in the outcome of this case. The Court of Claims ruling must be reversed, and this case should be remanded for further discovery and the submission of proof necessary to rebut the MPSC's unsubstantiated contention that it uses the Intrastate Decal Fee for only non-preempted purposes. There are at least four reasons why such a result is warranted.

First, as noted above, a $100 per-vehicle fee cannot help but affect the rates, routes, and service of a motor carrier. Indeed, the Intrastate Decal Fee stands as a direct roadblock to a motor carrier's very livelihood – the operation of its vehicles upon the highways of the state – and its continued assessment thus prompts the following question: If Congress intended to make entry into intrastate transportation markets easier by enacting Section 601, how can it be said that such a goal has been accomplished if motor carriers must still pay the exact same per-vehicle fee they paid before Section 601 went into effect? The answer to that question is apparent: It cannot be said that Congress's intent has been carried out because the MPSC has not dismantled the onerous financial barricade erected long before enactment of Section 601, and thus the

exact same roadblock "having a connection with or reference to" motor carrier prices, routes, and services continues to block Appellants' movement in the intrastate transportation market. The Intrastate Decal Fee, therefore, should not be permitted to stand untested as to its use and purpose.

Second, justification of the Intrastate Decal Fee based upon the unsubstantiated claim that it is used only for non-preempted purposes runs afoul of Congressional intent. Lest there be any question in this regard, the House Conference Report contemplated the exact type of argument advanced by the MPSC in this case with the following pointed comment:

> The conferees do not intend the regulatory authority which the States may continue to exercise ... to be used as a guise for continued economic regulation as it relates to prices, routes or services. There has been concern raised that States, which by this provision are prohibited from regulating intrastate prices, routes and services, may instead attempt to regulate intrastate trucking markets through its unaffected authority to regulate matters such as safety, vehicle size and weight, insurance and self-insurance requirements, or hazardous materials routing matters. The conferees do not intend for States to attempt to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority.

Report, reprinted in 1994 U.S. Code Cong. & Ad. News 1715, 1756 (emphasis supplied). In light of such express congressional intent, Appellants should be afforded the right to show that the Intrastate Decal Fee is a de facto regulation of their rates, routes, and services that cannot now be justified by the non-preempted powers the MPSC still retains.

Third, the broad claim of "safety" cannot in and of itself shield the Intrastate Decal Fee from Congressional attack under Section 601. As the district court explained in Federal Express, "[t]he field of safety, while susceptible to regulation, is not talismanic." 1993 WL 399380 at *4. Therefore, state safety regulation after federal preemption of economic entry and rate regulation may not be accomplished

> by means of blunt regulations which ... transgress into federally protected territory. The [state's] role in the protection of safety – however indispensable – must be fulfilled by well-tailored rules that do not relate to [a carrier's] rates, routes or services.

Id. at *6. Using the Federal Express court's words, the Intrastate Decal Fee is unlawfully "blunt," and it is certainly not "well-tailored." By law, it is expressly "assessed against and collected from each motor carrier for the administration of [the MMCA]" – the compilation of Michigan statutes that authorizes economic regulation of motor carrier prices, routes, and services. See MCL § 478.2(1); MSA 22.561(1) (emphasis supplied). At the same time, however, administration of Michigan's Motor Carrier Safety Act, MCL §§ 480.11, et seq; MSA 9.1666(1), et seq, is the job of the Department of State Police, not the MPSC, and Appellants are therefore rightly skeptical of the MPSC's sweeping proclamation that the Intrastate Decal Fee must be saved in the name of "safety."[23]

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[23]This is not to say that Michigan Trucking Ass'n, supra, was wrong in its conclusion that Section 601 did not preempt the MPSC's statutory authority to work with the Department of State Police in adopting a motor carrier safety rating system. 225 Mich App at 429, 571 NW2d at 736-37. However, nothing in that case supports the proposition that the same $100 per-vehicle fee collected for purposes of all regulation before Section 601 was enacted is somehow still justified after Section

601 disabled the MMCA and left the MPSC with far less authority than it possessed before.

Finally, even if the MPSC's safety regulatory authority were not so narrow, other factors also suggest that the MPSC cannot help but use the Intrastate Decal Fee for purposes wholly unrelated to its non-preempted regulation of Appellants' activities. Notably, the transportation of household goods remains subject to full economic regulation under the terms of Section 601, 49 USCA § 14501(c)(2)(B), yet MCL § 478.2(1); MSA 22.561(1) imposes only a $50 decal fee on vehicles used exclusively for the intrastate transportation of household goods. Therefore, the MPSC's continued economic regulatory authority over household goods transportation raises the obvious question of whether the $100 Intrastate Decal Fee imposed upon Appellants is being used by the MPSC to subsidize economic regulation of household goods carriers. In other words, Appellants should have been afforded the opportunity to conduct discovery to determine whether the Intrastate Decal Fee, just like the exempt carrier fee reviewed by the district court in Federal Express, supra, is "applied indiscriminately to the full range of ... regulatory activity," both preempted and non-preempted, after enactment of Section 601. 1993 WL 399380 at *7.

It is well established that, in addressing a motion for summary disposition, a trial court must give the benefit of the doubt to the non-movant and determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. Mahaffey v Attorney General, 222 Mich App 325, 340, 564 NW2d 104, 111 (1997). Moreover, summary disposition is premature if granted before discovery on a disputed issue is complete and if further discovery would stand a fair chance of uncovering factual support for the non-moving party's position. Great Lakes Gas Transmission Co. v MacDonald, 193 Mich App 571, 574-75, 485 NW2d 129, 131 (1992). The Court of Claims violated those principles in entering summary disposition in favor of Appellees because, as shown above, further discovery did stand

a fair chance of uncovering the type of factual record lacking in the In Re Federal Preemption case. In the absence of affording Appellants the opportunity to conduct that discovery, the Court of Claims wrongly concluded that In Re Federal Preemption is dispositive of Appellants' claim.

In short, Appellants could not have anticipated this Court's ruling in In re Federal Preemption when they first filed their motion for summary disposition in the Court of Claims, but they did preserve their right to respond to that ruling and demonstrate that the Intrastate Decal Fee cannot survive preemption scrutiny. Effective January 1, 1995, Congress's enactment of Section 601 made continued assessment of the Intrastate Decal Fee unlawful, and Appellants should be permitted on remand to prove just that. Summary disposition in favor of Appellees was improper and should be reversed.